UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

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CLERK, U.S. DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO, FLORIDA

UNITED STATES SECURITIES AND EXCHANGE COMMISSION,

Plaintiff,

-vs-

Case No. 6:99-cv-1222-Orl-28KRS

CORPORATE RELATIONS GROUP, INC., ET AL.,

Defendants.

ORDER

I. Introduction

Plaintiff, the Securities and Exchange Commission ("the SEC"), has brought this action against Defendants Roberto Veitia ("Veitia"), Corporate Relations Group, Inc. ("CRG"), Stratcomm Media, Ltd. ("Stratcomm") and Gulf Atlantic Publishing Corporation ("GAP") (collectively "the Veitia Defendants"),[1] alleging violations of federal securities laws.[2] In its Complaint (Doc. 1), the SEC alleges that the Veitia Defendants committed securities

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[1]Initially, there were seventeen total defendants in this suit. The original defendants included CRG; Stratcomm; GAP; Veitia; New Concepts L.L.C.; CJL Corporation; Pow Wow, Inc.; Fondo De Adquisiciones E Inversiones Internacionales XL, S.A.; C.A. Oportunidad, S.A.; Ammonia Hold, Inc.; James W. Spratt III; James A. Skalko; Jack R. Rodriguez; Jose Antonio Gomez Cortes; Arnold Zousmer; Charles J. Lidman; and Michael Parnell. All but the Veitia Defendants have entered into consent agreements with the SEC and judgments have been entered against them (Docs. 53, 54, 61, 85, 97, 98, 190, 218, 219, & 220).

[2]Sections 5, 17(a) and 17(b) of the Securities Act of 1933 (15 U.S.C. §§ 77e, 77q(a) and 77q(b)); Sections 10(b), 15(a)(1), and 20 of the Securities Exchange Act of 1934 (15 U.S.C. §§ 78j(b), 78o(a)(1), and 78t); and Rule 10b-5 (17 C.F.R. § 240.10b-5).

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fraud through their publishing and stock-trading activities. Additionally, the SEC alleges that the Veitia Defendants violated the anti-touting provisions of the securities laws by promoting securities without disclosing that they were compensated for the promotions or the amount of that compensation. The Complaint also contains allegations that Defendants CRG, Veitia, and Stratcomm sold unregistered securities. Finally, according to the SEC, CRG acted as a securities broker, and CRG and Stratcomm acted as securities dealers, without the required registrations. In addition to the alleged direct violations of the securities laws, the Complaint alleges that Veitia and Stratcomm are liable for CRG's infractions as controlling persons of CRG.

The parties agree that, except as to Count IV,[3] there are no disputed issues of material fact, and accordingly, each side has filed a motion for summary judgment which is now ripe for disposition.[4] For the reasons set forth below, the SEC's Motion for Summary

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[3]The Veitia Defendants contend that there are disputed facts as to the allegations in Count IV – sale of unregistered securities. However, as discussed in the text *infra*, the Court finds no genuine issues of material fact as to Count IV, and thus summary judgment is appropriate on that count as well as the other counts.

[4]The court has for consideration Plaintiff's Motion for Summary Judgment as to Defendants Veitia, Stratcomm, CRG and Gulf Atlantic (Doc. 191, filed April 5, 2002); Plaintiff's Memorandum in Support of Summary Judgment as to Defendants CRG, Stratcomm, Gulf Atlantic and Veitia (Doc. 192, filed April 5, 2002); Defendants' Corporate Relations Group, Inc., Gulf Atlantic Publishing, Inc., Roberto Veitia, and Stratcomm Media, Ltd. Supplemental Motion for Summary Judgment (Doc. 216, filed July 11, 2002); Defendants' Corporate Relations Group, Inc., Gulf Atlantic Publishing, Inc., Roberto Veitia, and Stratcomm Media, Ltd. Supplemental Memorandum in Opposition to Plaintiff's Motion for Summary Judgment and in Support of Defendants' Motion for Summary Judgment (Doc. 217, filed July 11, 2002); and Plaintiff's Memorandum in Opposition to Supplemental Motion for Summary Judgment by Defendants Corporate Relations Group, Inc., Gulf Atlantic Publishing, Inc., Roberto Veitia, and Stratcomm Media, Ltd. (Doc. 221, filed July 24, 2002). In light of the filing of Defendants' Corporate Relations Group, Inc., Gulf Atlantic Publishing,

Judgment shall be granted and the Veitia Defendants' Supplemental Motion for Summary Judgment shall be denied.

II. Background[5]

A. The Defendants

Defendant Roberto Veitia is a resident of central Florida. At all times relevant to this action, Veitia was intricately involved in the management of the Veitia corporate defendants, which were involved in the publication of investment-related material. He was the president and chairman of CRG; the president, chief executive officer, and chairman of the board of directors of Stratcomm; and the sole director of GAP. Veitia is listed as "publisher" on the masthead of the subject publications.

Defendant Stratcomm was a Vancouver, British Columbia corporation but maintained its principal offices in Winter Park, Florida. Although its headquarters continued to be located in Winter Park, Stratcomm later became incorporated in the Yukon Territory of

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Inc., Roberto Veitia, and Stratcomm Media, Ltd. Supplemental Motion for Summary Judgment (Doc. 216, filed July 11, 2002), Defendants' Corporate Relations Group, Inc., Gulf Atlantic Publishing, Inc., Roberto Veitia, and Stratcomm Media, Ltd. Motion for Summary Judgment (Doc. 205, filed June 4, 2002) is moot and will be denied as such.

[5]Defendants do not challenge Plaintiff's Statement of Uncontested Material Facts (Doc. 193) except those portions "that are argument and conclusions." (Doc. 216 at 1-2). Thus, the facts stated in the text are taken primarily from Plaintiff's Statement of Uncontested Material Facts (Doc. 193). See Case Management and Scheduling Order, Doc. 27, at 5 ("All material facts set forth in the statement required to be served by the moving party will be deemed admitted unless controverted by the opposing party's statement."). Defendants have not filed any affidavits or other evidence in support of their motion or in opposition to the SEC's motion, except for SEC filings of some of the issuer companies (Docs. 47-49).

Canada. Stratcomm is the parent company of CRG and GAP, as well as several other subsidiaries.

Defendant CRG was a wholly-owned subsidiary of Stratcomm. CRG operated as a stock promotion firm and was also headquartered in Winter Park, Florida. The company published investment-related material ranging from one-page faxes to the monthly full-color magazine, *Money World*. For a fee, CRG touted securities in its publications and forwarded investors' inquiries to brokers who then sold the securities featured in CRG publications to those investors.

Like the other Veitia corporate defendants, Defendant GAP was located in Winter Park, Florida. GAP was a wholly-owned subsidiary of Stratcomm and in late 1995 it succeeded CRG as the nominal publisher of investment-related materials, including *Money World*. Through these publications, GAP touted stock to the public. GAP employed the same staff and conducted the same publication activities as CRG.

Jose Antonio Gomez Cortes ("Gomez"), a Costa Rican lawyer and longtime friend of Veitia, was formerly a defendant in this action. At Veitia's request, Gomez incorporated Defendants Fondo de Adquisiciones e Inversiones Internacionales XL, S.A. ("Fondo") and C.A. Oportunidad, S.A. ("Oportunidad") in Costa Rica. Gomez acted at the direction of Veitia in the name of Fondo and Oportunidad. Gomez, Fondo, and Oportunidad are referred to collectively herein as "the Costa Rican defendants."

Gomez was the president of Fondo and for a time his daughter was the president of Oportunidad. Leonard Aronoff, general counsel for Stratcomm, had "power of attorney" for Fondo and Oportunidad, and he and Veitia directed the affairs of the Costa Rican corporate defendants. Neither Fondo nor Oportunidad had any business activity other than to serve as apparent foreign purchasers of securities on behalf of Veitia and CRG, so that CRG's client companies could sell securities to Fondo and Oportunidad in the belief that they were exempt from the Securities Act's registration requirements.

New Concepts, Inc., formerly a defendant in this action, was a registered broker-dealer incorporated in Illinois that entered into a profit-sharing agreement with CRG. The agreement, signed by Veitia, allowed CRG to use an account maintained at New Concepts in the names of CRG, Fondo, and Oportunidad to buy and sell securities promoted in CRG publications.

B. The Alleged Improper Practices

Counts I and III – Publication-Related Charges

The Veitia Defendants enlisted poorly capitalized issuers of publicly-traded securities to use the Veitia Defendants' publications to promote their stocks to the public. These publications were "operated by Stratcomm at Veitia's direction and control." (Doc. 193 at 2). First CRG, and then, beginning in late 1995, GAP, published newsletters, magazines, and other publications promoting the securities of issuers with whom CRG had entered into contracts for the provision of promotional services in exchange for monetary compensation, stock, or both. The publications at issue include *Money World*, *Confidential Fax Alert*, and *Growth Stock Alert*, among others.

Because many of the issuers whom the Veitia Defendants promoted were cash-poor, the only consideration for many of the promotion contracts was shares of stock of those issuers. After receiving shares as compensation, the Veitia Defendants would promote the stock in their publications. Shortly after the promotion of an issuer appeared in the Defendants' publications, the stock price of that issuer would rise in response to the promotion; the Defendants would then sell their stock for a profit. The SEC does not allege that the statements in the publications were false, but it does contend that material information was omitted from the publications which resulted in violations of several provisions of the securities laws.

In Count I of the Complaint, the SEC alleges that the Veitia Defendants engaged in a fraudulent scheme in the promotion, offer, purchase, and sale of securities. The Veitia Defendants allegedly violated the anti-fraud provisions of the securities laws through their practice of promoting securities to the public without disclosing that they were paid to do so and while at the same time selling those securities for their own profit, a practice known as "scalping." The Defendants allegedly employed the same fraudulent scheme as to fourteen different issuers of securities.

One illustrative example of the Defendants' scalping activities involves the securities of Ammonia Hold, formerly a defendant in this action. On February 14, 1996, eleven days after CRG signed a contract to promote Ammonia Hold and the same day CRG received 117,000 shares of Ammonia Hold stock, CRG named Ammonia Hold its stock "pick of the year" in one of its publications, *The Rumor Mill.* CRG sold its stock down to 35,500 shares by February 20, 1996; then, after acquiring 100,000 additional shares at low or no cost on February 22, 1996, CRG sold all but 1,000 shares by March 1. CRG also promoted Ammonia Hold in its other publications, including *The Growth Industry Report* and *Money*

World, during 1996, selling its shares while touting the company. The SEC alleges that CRG realized total profit of $3,587,080 from trading Ammonia Hold stock.

CRG entered into similar agreements with thirteen other issuers, each time profiting when the stock price rose after the favorable publication. The issuers and the alleged profit that CRG made on each issuer are summarized as follows:

Issuer	CRG Profit
Ammonia Hold	$3,587,080
Atlas Pacific	$ 346,281
Delta Petroleum	$3,956,067
ECO^2	$3,578,415
Foreland Corporation	$2,535,842
Global Intellicom	$ 563,881
Global Spill Management	$1,786,022
Golf Ventures	$ 735,015
Information Management Technologies	$1,535,126
Jreck Subs	$ 653,071
Sobiks Subs	$2,268,580
Tracker Corporation	$1,525,348
Vector Aeromotive Corporation	$ 411,388
Viking Management Group	$1,201,109

The SEC contends in Count I that the Veitia Defendants' practices in connection with these issuers constitute a fraudulent scheme in violation of Section 17(a), Section 10(b), and Rule 10b-5.

In Count III[6] of the Complaint, the SEC alleges that the Veitia Defendants, through their publications, violated Section 17(b) of the Securities Act. This section requires disclosure of sums received in consideration for publicity promoting a security. Although some of the publications contained some "disclaiming" language, some articles contained

[6]Count II of the Complaint does not pertain to the Veitia Defendants.

no attempts at disclosure. Moreover, the SEC contends that even the disclosures that were made did not satisfy Section 17(b).

For example, the *Money World* publication contained the following purported disclosure underneath the table of contents on the second page of that publication:

> . . . The information contained in *Money World* has been carefully compiled from sources believed to be reliable, but its accuracy is not guaranteed. This is not a solicitation to buy or sell securities and does not purport to give investment recommendations. Gulf Atlantic Publishing Inc. and Corporate Relations Group, its officers, directors and employees may from time to time have a position in the investments referred to in this advertiser-supported publication. . . .

(Doc. 197, Ex. 21 at 2). The same disclaimer appeared in the Growth Stock Alert. (See, e.g., Doc. 195, Ex. 2 at 2). The SEC contends that this disclaimer fell well short of the requirements of Section 17(b) of the Exchange Act because it failed to disclose that issuers were paying CRG for the recommendations in the publication and failed to state the amount that CRG was being compensated. Additionally, the SEC further argues that the language "may from time to time have a position" contained in the purported disclosure did not reveal that CRG, GAP, and their employees were "busily dumping the stock contrary to what they suggest[ed] to investors." (Doc. 193 at 27).

Although some of the promotions in *Money World* were labeled at the bottom of the page as "advertorials," the SEC contends that the term "advertorial" was not defined and "the appearance of the articles was intentionally made to blend with other editorial copy." (Doc. 193 at 27). The use of the term "advertorial" allegedly reflects CRG's knowledge of the disclosure requirements and its intention to evade disclosure. Additionally, as noted by the SEC, in his "publisher's column," Defendant Veitia promoted the companies mentioned in the "advertorial" features, and many of those companies were featured in articles in *Money World* and other publications without even the "advertorial" label.

Counts IV and V – Violations of Registration Requirements

In addition to the publication-related charges against all four of the Veitia Defendants, the SEC also contends that Defendants CRG, Veitia, and Stratcomm violated the registration requirements of the securities statutes. In Count IV of the Complaint, the SEC alleges that CRG, Veitia, and Stratcomm sold or offered for sale unregistered securities for which there was no applicable exemption from the registration requirements of the securities statutes. In Count V, the SEC asserts that CRG acted as an unregistered broker and that both CRG and Stratcomm acted as unregistered dealers.

In Count IV, Veitia, CRG, and Stratcomm are alleged to have attempted to use Regulation S to evade the registration requirements of the securities laws. In support of these allegations, the SEC points out that Veitia invited CRG clients to issue and sell securities to Fondo and Oportunidad, which were under Veitia's direction and control. Veitia represented to issuers that Fondo and Oportunidad were legitimate non-U.S. purchasers and that sales to Fondo and Oportunidad would be exempt under Regulation S from the registration requirements. Veitia persuaded five issuers – Tracker, Delta Petroleum, Ammonia Hold, Information Management Technologies, and Foreland Corporation – to issue unregistered, non-exempt securities.

The SEC identifies transactions involving Delta Petroleum as examples of Veitia and

CRG using Regulation S as a scheme to acquire additional stock for themselves. First, the SEC identifies an August 1995 transaction in which CRG arranged to purchase 231,000 shares of Delta Petroleum common stock as a Rule 144[7] private placement at a forty-five percent discount from market price. The SEC notes that at that time Rule 144 permitted holders of restricted shares to publicly sell those shares without registration if certain conditions were met, including that the securities had been held for at least two years. However, the Veitia Defendants purportedly reduced the restriction period from two years under Rule 144 to forty days under Regulation S – which allows for this lesser restrictive period for legitimate sales to offshore purchasers – through the appearance of selling the stock to one of the Costa Rican companies, Fondo or Oportunidad.

The SEC explains that on December 15, 1995, Gomez and Veitia executed a "Purchase Agreement" by which CRG purportedly sold 117,000 shares of Rule 144 restricted Delta Petroleum stock to Fondo for $702,000. In that agreement, CRG represented that the shares were being offered and sold as an offshore transaction under Regulation S, and Fondo represented that it was "acquiring the Shares for its own account, for investment purposes only and without the intent toward the further resale or distribution thereof." (Stip. Facts at ¶ 90) (citing Ex. 55 at 3). Three days later, on December 18, 1995, Aronoff wrote to the chairman and CEO of Delta Petroleum, Aleron "Buzz" Larson, opining

[7]SEC Rule 144 is codified at 17 C.F.R. § 230.144. It provides a safe harbor for certain securities sales, but it is not at issue here. The Veitia Defendants do not rely on Rule 144; instead they attempt to rely on Regulation S to avoid the registration requirements of Section 5. Rule 144 is mentioned in the facts only as part of the description of the Delta Petroleum transactions involving Fondo and Oportunidad.

that a stock certificate could be issued to Fondo for the 117,000 shares without restrictive language. Larson nevertheless instructed the stock transfer agent to legend the stock with a requirement that it not be sold in the United States for 40 days unless it was subject to a registration statement.

Larson demanded proof that Fondo was really an offshore purchaser and that Fondo was actually buying the shares. In response to this demand, Veitia provided Larson with a check signed by Aronoff drawn on Fondo's account to CRG for $702,000. However, unbeknownst to Larson at the time, that same day Veitia wrote a check on CRG's account for $702,000 payable to Fondo; hence, no money actually changed hands when Fondo purportedly bought these shares from CRG. On January 22, 1996, Aronoff and Larson both wrote to the stock transfer agent and had the Regulation S restriction removed from the stock certificate, thus allowing the stock to be sold freely in the United States without registration.

Veitia suggested that the remaining Rule 144 stock owned by CRG also be sold to Fondo, and Larson again asked for proof of the sale. The same scheme was employed. Veitia again presented a check showing payment by Fondo to CRG, but Veitia did not reveal that CRG issued a check to Fondo for the same amount that same day.

In addition to the Delta Petroleum transaction, the SEC also identifies sales of the stock of other corporations – including Tracker Corporation, Foreland Corporation, Information Management Technologies Corporation, and Ammonia Hold – where Regulation S was used as a ruse by Veitia and CRG. These transactions also involved similar use of Fondo and Oportunidad in an attempt to avoid the requirement that the securities be registered.

Finally, in Count V of the Complaint, the SEC alleges that CRG acted as a broker without registering as a broker as required by Section 15(a) of the Exchange Act and that CRG and Stratcomm acted as dealers without being registered as a dealer as required by the same section. The SEC contends that from September 1994 through December 1996, CRG, through its broker relations executives ("BREs"), touted its clients' securities to registered representatives. By promoting and selling securities in this manner, CRG allegedly acted as a broker without the required registration.

The SEC also contends that from September 1994 through December 1996, CRG bought and sold securities for its own account through Fondo and Oportunidad. During this time period CRG allegedly bought and sold securities in hundreds of transactions without being registered as a dealer. Additionally, from October 1994 through early 1996, Stratcomm allegedly sold approximately one million shares of its own stock directly to members of the public without being registered as a dealer.

C. Remedies Sought

The SEC contends that the Veitia Defendants or their successors continue to promote cheap stocks. Veitia allegedly promotes stocks on the Internet and publishes the *Financial Sentinel*. Veitia and CRG allegedly operate the *Financial Sentinel* and the website "worldmicrocap.com," and Stratcomm is the alleged registered owner of the website. Stratcomm also allegedly continues to improperly rely on exemptions to avoid SEC registration. Based on these continued activities, the SEC seeks a permanent injunction preventing the Defendants from committing further violations of the securities laws. The SEC also seeks disgorgement of the proceeds from the Veitia Defendants' unlawful conduct in the amount of $25,571,443 plus prejudgment interest from January 1, 1996.

Finally, the SEC seeks the imposition of civil penalties against the Veitia Defendants. The SEC contends that the Veitia Defendants' violations of the securities laws involved fraud, deceit, and deliberate or reckless disregard of regulatory requirements and resulted in substantial losses to third persons. According to the SEC, the Defendants' conduct warrants a substantial third-tier civil penalty under Section 21(d)(3)(B)(iii) of the Exchange Act (15 U.S.C. § 78u(d)(3)(B)(iii)).

D. Defendants' Position

In response to the SEC's allegations, Defendants maintain that they "were engaged in the lawful business of promoting public companies and publishing investor information." (Doc. 217 at 2). Defendants deny the securities fraud claim against them and contend that they disclosed that their publications were paid advertisements to the extent required by law. Defendants also dispute that the SEC is entitled to summary judgment on the sale-of-unregistered-securities claim and the unregistered broker claim.

III. Discussion

A. Summary Judgment Standards

Summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). The moving party bears the burden of establishing that no genuine issues of material fact remain. Celotex Corp. v. Catrett, 477 U.S. 317 (1986). In ruling on a motion for summary judgment, "[t]he function of the court is not to 'weigh the evidence and determine the truth of the matter but to determine whether there is an issue for trial.'" Lockett v. Wal-Mart Stores, Inc., No. Civ.A. 99-0247-CB-C, 2000 WL 284295, at *2 (S.D. Ala. Mar. 8, 2000) (quoting Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249 (1986)). As noted earlier, in the instant case the parties largely do not dispute the facts and agree that the issues presented are legal questions which are aptly resolved by summary judgment.

B. The Merits of the Parties' Summary Judgment Motions

Count I – Section 17(a) of the Securities Act; Section 10(b) of the Exchange Act and Rule 10b-5 Promulgated Thereunder

As previously stated, in Count I of the Complaint, the SEC alleges securities fraud against the Veitia Defendants under Section 17(a) of the Securities Act of 1933 (15 U.S.C. § 77q(a)),[8] Section 10(b) of the Securities Exchange Act of 1934 (15 U.S.C. § 78j(b)),[9] and

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[8]Section 17(a) (15 U.S.C. § 77q(a) (1997)) provides:

> (a) Use of interstate commerce for purpose of fraud or deceit
>
> It shall be unlawful for any person in the offer or sale of any securities by the use of any manner or instruments of transportation or communication in interstate commerce or by the use of the mails, directly or indirectly—
>
> (1) to employ any device, scheme, or artifice to defraud, or
> (2) to obtain money or property by means

Rule 10b-5 (17 C.F.R. § 240.10b-5).[10] The SEC contends that the Veitia Defendants'

> of any untrue statement of a material fact or any omission to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or
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> (3) to engage in any transaction, practice, or course of business which operates or would operate as a fraud or deceit upon the purchaser.

[9]Section 10(b) of the Securities Exchange Act of 1934 (15 U.S.C. § 78j(b) (1997)) provides:

> It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce or of the mails, or of any facility of any national securities exchange—
>
> . . . .
>
> (b) To use or employ, in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered, any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.

[10]Rule 10b-5 (17 C.F.R. § 240.10b-5) provides:

> Employment of manipulative and deceptive devices.
>
> It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails or of any facility of any national securities exchange,
>
> (a) To employ any device, scheme, or artifice to defraud,
>
> (b) To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of

practice of promoting securities to the public in its publications while at the same time selling those securities for their own profit violates these provisions in two ways. First, the SEC avers that the Veitia Defendants' failure to disclose that they were being paid for the promotions of stock constitutes fraud under these provisions. Second, the SEC argues that the Veitia Defendants committed fraud in violation of these laws by not disclosing that they were profiting from their recommendations by selling their holdings while recommending buying to their readership.

To establish a violation of Section 17(a), Section 10(b), and Rule 10b-5, the SEC must show the following: 1) a material misrepresentation or an omission; 2) that the misrepresentation or omission was made in connection with the purchase or sale of a security; 3) scienter[11]; and 4) the involvement of interstate commerce, the mails, or a national securities exchange. See, e.g., SEC v. Dain Rauscher, Inc., 254 F.3d 852, 855-56

> the circumstances under which they were made, not misleading, or
>
> (c) To engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person, in connection with the purchase or sale of any security.

[11]In Aaron v. SEC, 446 U.S. 680 (1980), the United States Supreme Court held that scienter is an element of violations of Section 10(b), Rule 10b-5, and Section 17(a)(1) but not of Section 17(a)(2) or 17(a)(3). In the instant case, the SEC alleges a violation of section 17(a), apparently alleging the subparagraphs of Section 17(a) in the alternative. Because this Court finds that scienter has been shown here, the minimum state of mind has been established as to any of the three subparagraphs of Section 17(a). See SEC v. Schiffer, No. 97 Civ. 5853(RO), 1998 WL 307375, at *3 n.12 (S.D.N.Y. June 11, 1998) ("Because I have found scienter to exist under the facts[,] however, the Aaron court's holding has no impact here.").

(9th Cir. 2001); SEC v. Tandem Mgmt. Inc., No. 95 CIV.8411(JGK), 2001 WL 1488218, at *9 (S.D.N.Y. Nov. 21, 2001); SEC v. McCaskey, No. 98 CIV.6153(SWK), 2001 WL 1029053, at *4 (S.D.N.Y. Sept. 6, 2001); SEC v. Chem. Trust, No. 00-8015-CIV, 2000 WL 33231600, at *9 (S.D. Fla. Dec. 19, 2000). The SEC has established each of these elements in this case as to both of its theories of fraud.

i. Material omission

An omission is material if there is "'a substantial likelihood that the disclosure of the omitted fact would have been viewed by the reasonable investor as having significantly altered the "total mix" of information made available.'" Basic Inc. v. Levinson, 485 U.S. 224, 231-32 (1988) (quoting TSC Indus., Inc. v. Northway, Inc., 426 U.S. 438, 449 (1976)). Both the fact that the Veitia Defendants were paid by the issuers of stock for the favorable articles and the fact that the Veitia Defendants were selling their shares while recommending the purchase of the stock are material.

First, a reasonable investor would certainly consider it relevant to the "total mix" of information that the Veitia Defendants were paid in stock of the companies they promoted in exchange for the promotions. It is undisputed that the issuer companies entered into contracts for the publication of favorable articles, and in most cases those companies paid for the promotions in stock. (See, e.g., Doc. 198 Ex. 36 (contract to promote Ammonia Hold)). A reasonable investor, reasonably viewing the articles as objective opinions about the promoted companies, would be misled unless they were made aware that the articles were paid for by those promoted companies. SEC v. Huttoe, Civ. Action No. 96-2543 (GK), 1998 U.S. Dist LEXIS 23211, at *19 (D.D.C. Sept. 14, 1998) (finding that "the paid promotional nature" of newsletter articles was material to potential investors who subscribed to newsletter).[12]

Although the Defendants assert that they did disclose the "paid for" nature of the favorable articles through the labeling of some of the articles as "advertorials," copyright notices on the publications, and the inclusion of a "disclaimer," the Court is unpersuaded. The "advertorial" label on some, but not all, of the articles does not clearly convey the fact that the Defendants were paid in the promoted companies' stock for the promotions. As discussed in more detail in connection with the Section 17(b) claim below, this notation simply does not convey to the reader that the articles, which appear in a news-item format, were indeed purchased by the subject companies; this label does not provide investors with the material information regarding the publishers' bias. And again, this inadequate label did not appear on all of the articles. Similarly, the copyright notice does not convey this material information.

Moreover, the purported "disclosure" that CRG employees "may from time to time have a position" in the subject securities is inadequate to inform readers of the fact that the publisher of the article was paid – often in stock – in exchange for the favorable publicity. See, e.g., SEC v. Blavin, 760 F.2d 706, 711 (6th Cir. 1985) ("In this factual context, a disclaimer that the investment advisor 'may' trade in recommended securities for its own account is itself a material misstatement. The effect of such large holdings on Blavin's

[12]A copy of the Huttoe opinion is attached to Plaintiff's Memorandum (Doc. 192).

objectivity in making investment recommendations would be particularly important to his clients."); Huttoe, 1998 U.S. Dist. LEXIS 23211, at *21 (noting that "[n]ewsletter subscribers simply could not tell from the disclaimer that [the defendant] was paid to promote the stocks about which he wrote and, thus, were deprived of information substantially likely to affect their investment decision"). Hence, the Veitia Defendants' contention that they conveyed the material fact of payment is without merit.

Second, the fact that the Veitia Defendants were selling their stock at the same time they were encouraging their readers to buy would clearly be material to reasonable investors. The SEC has presented abundant evidence that the timing of the Veitia Defendants' stock sales was tied to the promotional articles, and the fact that the Veitia Defendants were not heeding their own advice about the subject stocks would be important to a reasonable reader of the publications. Again, the "from time to time" language is inadequate to convey the reality of the Veitia Defendants' stock sales, which were intentionally timed rather than coincidental with the publications. See, e.g., Zweig v. Hearst Corp., 594 F.2d 1261, 1266-67 (9th Cir. 1979) ("Reasonable investors who read the column would have considered the motivations of a financial columnist . . . important in deciding whether to invest in the companies touted. . . . [The columnist] failed to reveal to investor-readers that he expected to gain personally if they followed his advice. This withheld information . . . was necessary to avoid misleading [the columnist's] audience on the reliance they could place on the column.").

In sum, the Court rejects the Veitia Defendants' contention that the promotions were disclosed as paid advertisements and that the public was not misled to believe that the promotions were independent opinions. As discussed in more detail in connection with the Section 17(b) claim *infra*, the Veitia Defendants' attempted disclaimers were inadequate and misleading, and even if some of the promotions were disclosed as paid advertising, the Veitia Defendants' stock trading practices, which do not go hand-in-hand with the publication of advertising, are material facts that were omitted. See Huttoe, 1998 U.S. Dist. LEXIS 23211, at 29 ("[T]he fraud lies not in [the] practice of selling stocks contrary to [the newsletter's] recommendations, but in the failure to disclose that practice to potential investors and readers. The practice reflects on the objectiveness of the investment advice and is therefore material.").

ii. In connection with the purchase or sale of securities

Second, the Veitia Defendants' omission of material information was "in connection with" the purchase or sale of securities. The Veitia Defendants were acquiring stock and then selling that stock while recommending that their readers purchase those same stocks. The obvious purpose of the promotional articles was to induce readers to invest. See SEC v. Blavin, 557 F. Supp. 1304, 1310-11 (E.D. Mich. 1983) ("Nor can there be any dispute that the statements were made in connection with the purchase and sale of securities. The sole purpose of the newsletters was to recommend the purchase of certain stock, which was exactly the same stock that Blavin was contemporaneously buying and selling."), aff'd, 760 F.2d 706 (6th Cir. 1985). The requirement of Section 10(b) that the omission be "in connection with" the purchase or sale of securities is satisfied "whenever it may reasonably be expected that a publicly disseminated document will cause reasonable investors to buy or sell securities in reliance thereon, regardless of the motive or existence of contemporaneous transactions by or on behalf of the violator." SEC v. Savoy Indus., Inc., 587 F.2d 1149, 1171 (D.C. Cir. 1978). The SEC has satisfied this requirement.

iii. Scienter

The SEC must also show that the Veitia Defendants acted with scienter, a state of mind which in this circuit is satisfied by severe recklessness. See, e.g., Ziemba v. Cascade Int'l, Inc., 256 F.3d 1194, 1202 n.2 (11th Cir. 2001). The SEC has established that the Veitia Defendants acted with at least severe recklessness and thus acted with scienter. The Veitia Defendants' repeated pattern of purchasing the securities of fourteen companies over a two-year period followed by touting and sales at a tremendous profit shows repeated, willful activity. See Blavin, 760 F.2d at 712 ("At a minimum, Blavin recklessly failed to disclose that he was trading in stocks that his newsletter recommended . . . ."). Although the Veitia Defendants argue that it is an accepted practice for companies to purchase promotional services with stock and that it is not reasonable for a promoter to be prohibited from selling that stock, the facts of this case go far beyond the mere selling of stock received for promotional services. The Defendants' scalping practice – the acquisition of stock, followed by touting of that stock in an effort to drive up the price, followed by a sale of that stock at a substantial profit – shows an intent to manipulate the market in a manner proscribed by the securities laws.

Moreover, the Veitia Defendants' argument that scienter is negated by the disclosure of the promotions as advertisements is without merit. The fact that an article is paid for –

which is far from clear in the Veitia Defendants' publications – does not constitute disclosure that the publisher has been paid in the company's stock or that the publisher is selling that stock while encouraging readers to buy. Again, the alleged "disclosures" were inadequate, did not appear on every article, and in no way revealed the Veitia Defendants' scalping practices. See Huttoe, 1998 U.S. Dist. LEXIS 23211, at *22, 32-33 ("Clearly Terry must have known that the footnote in the Newsletter could not have adequately alerted subscribers to the fact that he and Melcher received free stock for promoting the companies they urged subscribers of the Newsletter to buy. . . . Since the practice of scalping is not disclosed, as a matter of law, the disclaimer appearing in the Whisper Newsletter does not constitute 'disclosure' within the meaning of the securities laws, nor does it divest Terry of scienter."). The SEC has established the element of scienter.

iv. Mail and/or interstate commerce

Finally, the Veitia Defendants used the mails or interstate commerce in connection with their fraudulent activities. It is undisputed that the Veitia Defendants' publications traveled through the mails and in commerce. This requirement has also been satisfied.

Conclusion as to Count I

In sum, all of the elements of Count I have been established by the SEC. The SEC has shown that the Veitia Defendants omitted material information regarding both the receipt of compensation for the promotional articles and the fact that the Veitia Defendants were selling the securities that they were recommending that their readers purchase. This information was plainly omitted with at least severe recklessness, in connection with the purchase or sale of securities, and through the use of interstate commerce and the mails.

Count III[13]– Section 17(b) of the Securities Act

In Count III of the Complaint, the SEC alleges violations of the anti-touting provisions in Section 17(b) of the Securities Act of 1933 (15 U.S.C. § 77q(b)).[14] As the Court of Appeals for the D.C. Circuit has noted, this section "[b]y its terms . . . applies to 'any' person who publishes 'any' article which, 'though not purporting to offer a security for sale, describes such security for a consideration received . . ., directly or indirectly, from an issuer, underwriter, or dealer' without disclosing the consideration." SEC v. Wall St. Publ'g Inst., Inc., 851 F.2d 365, 369 (D.C. Cir. 1988) (quoting 15 U.S.C. § 77q(b)), cert. denied, 489 U.S. 1066 (1989). The statute requires "full[] disclos[ure of both] the receipt . . . of . . . consideration and the amount thereof." 15 U.S.C. § 77q(b). Scienter is not an element of a Section 17(b) violation. See, e.g., SEC v. Liberty Capital Group, Inc., 75 F. Supp. 2d

[13]As noted earlier, Count II of the Complaint does not pertain to the Veitia Defendants.

[14]Section 17(b) provides:

> Use of interstate commerce for purpose of offering for sale
>
> It shall be unlawful for any person, by the use of any means or instruments of transportation or communication in interstate commerce or by the use of the mails, to publish, give publicity to, or circulate any notice, circular, advertisement, newspaper, article, letter, investment service, or communication which, though not purporting to offer a security for sale, describes such security for a consideration received or to be received, directly or indirectly, from an issuer, underwriter, or dealer, without fully disclosing the receipt, whether past or prospective, of such consideration and the amount thereof.

1160, 1163 (W.D. Wash. 1999).

The SEC has established its Section 17(b) claim. Although the Veitia Defendants contends that the "total mix" of disclosures that they made complies with Section 17(b), the Veitia Defendants have plainly "publish[ed], give[n] publicity to, or circulate[d] a[] notice, circular, advertisement, newspaper, article, letter, investment service, or communication which, though not purporting to offer a security for sale, describes such security for a consideration received or to be received, directly or indirectly, from an issuer, underwriter, or dealer, without fully disclosing the receipt, whether past or prospective, of such consideration and the amount thereof." 15 U.S.C. § 77q(b). Thus, the Veitia Defendants have plainly violated Section 17(b). See Liberty Capital, 75 F. Supp. 2d at 1161 (denying the defendants' motion to dismiss touting claim under Section 17(b) where it was alleged that the defendants "publish[ed] favorable accounts of publicly-traded companies in a newsletter and on the Internet without disclosing that those companies had paid them cash and stock"); Huttoe, 1998 U.S. Dist. LEXIS 23211, at *35 (finding violation of Section 17(b) where newsletter author "did not disclose that he received stock as consideration in exchange for writing articles promoting the stock" and finding disclaimer inadequate).

Putting aside for a moment the Veitia Defendants' contentions regarding the sufficiency of the "advertorial" label and other purported disclosures on some of the offending publications, the absence of any sort of disclosure from many of the articles establishes that the Veitia Defendants violated Section 17(b) at least as to these items. As to these articles, neither the receipt of nor the amount of compensation was disclosed.

Although some of the publications contained supposed disclaimers and disclosures, even these are inadequate. Many of the articles published by the Veitia Defendants were labeled "Special Advertorial Feature" in small print at the bottom of each page. At the end of those "Special Advertorial Feature" articles was a paragraph in small print at the bottom of the page which provided:

> ©1995 The Tracker Corporation of America. This advertorial is not a solicitation to buy or sell securities and this does not purport to be a complete analysis of the company mentioned. Investing in securities is speculative and carries a high degree of risk. Past performance does not guarantee future results. For further information on this company please contact a company representative. This report was prepared by Corporate Relations Group, Inc. (CRG). The information set forth herein was obtained from sources believed reliable, but CRG does not guarantee its accuracy or completeness. CRG is retained by the company as investor relations counsel. Officers, directors, and employees of CRG may from time to time have a position in the securities mentioned.

(Doc. 195 Ex. 4, at 12) (following "Special Advertorial Feature" on the Tracker Corporation). The Veitia Defendants rely on several parts of this paragraph in arguing that they satisfied the disclosure requirements of Section 17(b). However, each of the statements upon which the Veitia Defendants place reliance falls short of the requirements of Section 17(b).

First, as noted in connection with Count I *supra*, the statement that CRG or its employees "may from time to time have a position in the securities mentioned" does not accurately describe the reality of what occurred – that the Veitia Defendants were paid in the stock of the company for the publication of the article about that company and were selling that stock while recommending purchase. This statement does not constitute disclosure of the receipt of consideration or the amount thereof. See also *In re* Lehl, SEC Release No. 33-8102, 77 S.E.C. Docket 1926, 2002 WL 1315552, at *11 (May 17, 2002) (concluding that "[t]he disclosure that persons associated with [the subject publications] 'may' receive compensation or may receive securities is misleading and inadequate [to satisfy Section 17(b)] when they in fact received or contracted to receive compensation, including [promoted company's] stock") (footnotes omitted).

Next, the Veitia Defendants rely on the copyright at the bottom of the "Special Advertorial Feature" articles. The Veitia Defendants note that the issuer (Tracker in the example of the above), rather than CRG or GAP, holds the copyright. However, as the SEC replies (Doc. 221 at 10), a copyright denotes ownership rather than authorship,[15] and the copyright notice does not reveal that the Veitia Defendants were paid by the featured company to write the article. Similarly, the statement that CRG has been "retained by the company as investor relations counsel" also fails to enlighten the reader as to the receipt of compensation in exchange for the article.

The Veitia Defendants also argue that the promoted companies disclosed their contracts with CRG and the compensation paid to CRG in their public filings with the SEC. However, Section 17(b) requires the "person" who publishes the article to disclose the receipt of compensation for the article. 15 U.S.C. § 77q(b) ("It shall be unlawful for any person . . . to publish . . . any notice, circular, advertisement, newspaper, article, letter, investment service, or communication . . . without fully disclosing the receipt, whether past or prospective, of such consideration and the amount thereof."). The Veitia Defendants

[15]Black's Law Dictionary defines "copyright" as "[a] property right in an original work of authorship (such as a literary, musical, artistic, photographic, or film work) fixed in any tangible medium of expression, giving the holder the exclusive right to reproduce, adapt, distribute, perform, and display the work." Black's Law Dictionary 337 (7th ed. 1999).

failed to make the disclosure required by the statute, regardless of what might have appeared in the issuers' public filings.

Finally, in their principal argument the Veitia Defendants contend that the articles were disclosed as paid advertisements through the use of the label "advertorial." The Veitia Defendants cite a dictionary definition of "advertorial": "An extended newspaper or magazine text advertisement that promotes the advertiser's product or services or special point of view but resembles an editorial in style and layout." (Doc. 217 at 5) (citing Webster's Encyclopedic Unabridged Dictionary of the English Language (1994)). Additionally, the Veitia Defendants cite one federal case addressing the word, Ortho Pharmaceutical Corp. v. Cosprophar, Inc., 32 F.3d 690, 693 (2d Cir. 1994) ("Cosprophar styled its advertisements as 'advertorials,' which are newspaper and magazine advertisements that are formatted in the same style as news articles and are placed adjacent to news items. As the district court noted, the advertorial format was designed 'to enhance the seriousness and credibility of [Cosprophar's] advertising.'") (citation omitted) (alteration in original), aff'g 828 F. Supp. 1114 (S.D.N.Y. 1993). The Court's research has uncovered only a handful of other cases commenting on or even mentioning the term "advertorial."[16]

[16]See Rancho Publ'ns v. Superior Court, 81 Cal. Rptr. 2d 274, 276 n.1 (Cal. Ct. App. 1999) (citing Ortho Pharmaceutical and noting, "An advertorial (a term in use for more than 40 years) is an advertisement in a print publication that is formatted in the same style as a news article or editorial and conveys a similar-looking content. Advertorials have been described as "Editorial Space for Sale." They are the newspaper equivalent of television's infomercials.") (citations omitted); Seldon v. Shanken, 531 N.Y.S.2d 264, 265 (App. Div. 1988) (describing, in libel action, the plaintiff's "attempt to solicit wineries to buy space in a weekly 'paid advertisement,' or 'advertorial,' column that [the plaintiff] planned to run in the

Despite the Veitia Defendants' arguments to the contrary, the "advertorial" label that appeared on the bottom of some, but not all, of the offending articles simply does not convey to the reader that CRG was compensated for the recommendation of the stock of the company being promoted. Although the word may suggest an advertising component, this is not the end of the inquiry. Section 17(b) encompasses "any notice, circular, advertisement, newspaper, article, letter, investment service, or communication"; no matter how the published item is categorized or labelled, the receipt of and amount of consideration must be disclosed. The "advertorial" label simply does not "fully disclose" the receipt of compensation by the publisher of the item. Moreover, the Veitia Defendants clearly did not disclose the amount of compensation received from the companies they promoted. And, even the inadequate "advertorial" label was not used on every article.

The Veitia Defendants also argue that Section 17(b) is unconstitutional as applied to a publisher who discloses that its publication is a paid advertisement. They contend that the requirements of Section 17(b) violate the right to freedom of speech conferred by the First Amendment to the United States Constitution, averring that the required disclosures amount to an improper content-based regulation of commercial speech. However, the Court finds no constitutional infirmity in Section 17(b).

New York Times or *Los Angeles Times*"); see also Pro Football Weekly, Inc. v. Gannett, Co., No. 85 C 6612, 1991 WL 256693 (N.D. Ill. Nov. 20, 1991) (referring, apparently to advertising campaign, as the "MCI Advertorial" project), aff'd, 988 F.2d 723 (7th Cir. 1993); Neary v. Pa. Pub. Util. Comm'n, 468 A.2d 520, 521 (Pa. Commw. Ct. 1983) (noting that "telephone directory service is provided only for the purpose of assisting 'the public in associating a listed party with the proper call number'. . . . The directory white pages, in sum, are not an advertorial service."), aff'd, 487 A.2d 345 (Pa. 1985).

Although disclosure requirements are not without constitutional implications, such provisions are permissible. In Zauderer v. Office of Disciplinary Counsel of the Supreme Court of Ohio, 471 U.S. 626, 651 (1985), the Supreme Court held that "unjustified or unduly burdensome disclosure requirements might offend the First Amendment by chilling protected commercial speech," but "an advertiser's rights are adequately protected as long as disclosure requirements are reasonably related to the State's interest in preventing deception of consumers." Under this standard, Section 17(b) has been upheld against constitutional challenges. See SEC v. Wall St. Publ'g Inst., Inc., 851 F.2d 365, 374 (D.C. Cir. 1988) (finding that magazine's "failure to disclose consideration received in return for publication is then, in principle, constitutionally proscribable"); Huttoe, 1998 U.S. Dist. LEXIS 23211, at *40-41 ("Regulations which turn solely on whether consideration was paid for publication of an article, and not the content of the article, are constitutionally permissible."). In accordance with the reasoning of these cases, the Court finds that the Veitia Defendants' contentions of unconstitutionality are without merit.

In sum, the SEC is entitled to summary judgment on Count III. The record evidence establishes that the Veitia Defendants published articles or advertisements without disclosing the receipt of compensation therefor or the amount of that compensation, thus violating Section 17(b), which is not unconstitutional.

Count IV – Sections 5(a) and 5(c) of the Exchange Act

In Count IV of the Complaint, the SEC alleges, against Defendants CRG, Veitia, and Stratcomm, sale of unregistered securities, in violation of Sections 5(a) and 5(c) of the

Securities Exchange Act of 1933 (15 U.S.C. §§ 77e(a) and (c)).[17] These Defendants are alleged to have violated Section 5 by selling securities to or through Fondo and Oportunidad purportedly under Regulation S in an effort to evade the registration requirements.

Section 5 prohibits the direct or indirect sale or offering for sale of any security unless

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[17]Sections 5(a) and 5(c) of the Securities Exchange Act of 1933 (15 U.S.C. §§ 77e(a) and (c)) provide:

> (a) Sale or delivery after sale of unregistered securities
>
> Unless a registration statement is in effect as to a security, it shall be unlawful for any person, directly or indirectly—
>
> > (1) to make use of any means or instruments of transportation or communication in interstate commerce or of the mails to sell such security through the use or medium of any prospectus or otherwise; or
> >
> > (2) to carry or cause to be carried through the mails or in interstate commerce, by any means or instruments of transportation, any such security for the purpose of sale or for delivery after sale.
>
> . . . .
>
> (c) Necessity of filing registration statement
>
> It shall be unlawful for any person, directly or indirectly, to make use of any means or instruments of transportation or communication in interstate commerce or of the mails to offer to sell or offer to buy through the use or medium of any prospectus or otherwise any security, unless a registration statement has been filed as to such security, or while the registration statement is the subject of a refusal order or stop order or (prior to the effective date of the registration statement) any public proceeding or examination under section 77h of this title.

there is a registration statement in effect for that security or there is an applicable exemption for the sale. One such exemption is set forth in Regulation S (17 C.F.R. § 230.901 et seq.), pursuant to which securities may be sold or offered for sale outside of the United States without registration if and only if certain requirements are satisfied. Some of the requirements for a valid Regulation S transaction are that the regulation not be employed as part of a plan or scheme to avoid the registration provisions and that the offshore purchaser not be a United States person or a person acquiring the shares on behalf of a United States person. 17 C.F.R. ch. II, pt. 230 prelim. notes; 17 C.F.R. § 230.903.

"In order to establish a prima facie case for violation of Section 5, the SEC must show that (1) securities were offered or sold for which no registration statement was filed or in effect; (2) the offering or sale was made through the means or instruments of transportation or communication in interstate commerce or the mails; and (3) defendants, directly or indirectly, offered or sold the securities." SEC v. Friendly Power Co., 49 F. Supp. 2d 1363, 1367 (S.D. Fla. 1999); accord SEC v. Parnes, No. 01CIV 0763 LLS THK, 2001 WL 1658275, at *6 (S.D.N.Y. Dec. 26, 2001). Scienter is not an element of a Section 5 violation. Parnes, 2001 WL 1658275, at *6; SEC v. Softpoint, Inc., 958 F. Supp. 846 (S.D.N.Y. 1997), aff'd, 159 F.3d 1348 (2d Cir. 1998). Moreover, because "the party claiming exemption from registration requirements bears the burden of proving that the exemption applies," Parnes, 2001 WL 1658375, at *6, the Defendants must show their entitlement to the benefit of Regulation S.

The SEC has established each element of a Section 5 violation in this case. It is clear that there was no registration in effect for the securities at issue, that the offering was made through interstate commerce or the mails, and that the Defendants offered or sold the securities. The evidence shows that the Defendants controlled the Costa Rican entities, Fondo and Oportunidad, and misrepresented those entities as legitimate foreign purchasers to whom stock could be sold under Regulation S without registration. Sales to these entities were de facto sales to these Defendants orchestrated by these Defendants, and the Defendants have not established a basis for the invocation of Regulation S or any other applicable exemption. Cf. Softpoint, 958 F. Supp. at 861 ("Regulation S shelters only bona fide overseas transactions; it is not a haven for any foreign stock distribution that is part of a plan to evade the registration provisions of the Securities Act. . . . [Defendant] exposed [the stock] distributions as a preconceived artifice – designed to cloak the sale of unregistered securities in the United States. Consequently, the . . . scheme fails to qualify for the safe harbor exemption under Regulation S.") (record citation omitted). Because all of the elements of a Section 5 violation have been shown, the SEC is entitled to summary judgment on this count.

Although the Defendants argue that the record facts, when considered in their favor, do not establish that sales of securities by Fondo and Oportunidad were not within the scope of Regulation S, the record reveals that the Defendants controlled Fondo and Oportunidad in an attempt to evade the registration requirements. While the Defendants assert that the evidence shows merely a "close relationship" among Gomez, CRG, Veitia, and Aronoff, the evidence demonstrates that the Defendants controlled Fondo and Oportunidad and used those Costa Rican entities in an attempt to evade the registration requirements of the securities laws. Thus, the Defendants have not established the applicability of Regulation

S.

In his deposition, Gomez stated that although he is the president of Fondo, at Veitia's direction he granted power of attorney to Aronoff; it was "a very, very open power of attorney" that gave Aronoff the power to do whatever was necessary on behalf of Fondo and Oportunidad. (Dep. of Jose Antonio Gomez Cortes, Doc. 199 Ex. 50, at 37, 214). Whenever Gomez needed to sign a contract or authorize "any important document," including transfers of money, Gomez called Veitia to confirm that it was okay. (Doc. 199 Ex. 50, at 40, 74-75, 199). Although Gomez did not know anything about United States securities law, Veitia told him that Regulation S "allows foreigners to maintain with less time restricted shares." (Doc. 199 Ex. 50, at 65). All of Gomez's knowledge of Regulation S came from Veitia. (Doc. 199 Ex. 50, at 66).

Gomez explained in his deposition that Veitia had asked Gomez to form both Fondo and Oportunidad. (Doc. 199 Ex. 50, at 69-70). When Veitia said that it was important that someone other than Gomez be the president of Oportunidad, Gomez decided that his daughter, who was nineteen or twenty years old at the time, would be president of Oportunidad. (Doc. 199 Ex. 50, at 69-70). From Gomez's point of view, Fondo and Oportunidad "was one thing." (Doc. 199 Ex. 50 at 73).

At some point Gomez became president of Oportunidad; he did not want his daughter involved. (Doc. 199 Ex. 50 at 73-74). Gomez was not sure where money came from for Fondo or Oportunidad to purchase shares of stock, but it was not from Gomez's pocket. (Doc. 199 Ex. 50, at 75). Although Gomez wrote or signed checks for the corporation, Gomez did not know how the money got in the corporate accounts; Aronoff took care of that.

(Doc. 199 Ex. 50, at 76). Aronoff sent checks to Gomez so that Gomez could open accounts at Banco de Costa Rica and at First Union in Miami. (Doc. 199 Ex. 50, at 76). Gomez did not make any investment decisions with respect to Fondo or Oportunidad, nor did his daughter; the investment decisions were made by either Veitia or Aronoff. (Doc. 199 Ex. 50, at 68, 77).

Fondo and Oportunidad opened securities trading accounts in the United States of Canada. (Doc. 199 Ex. 50, at 79). Gomez probably had to sign, as president, to open the account at Union Securities, but he did so at Aronoff's direction. (Doc. 199 Ex. 50, at 80). As of the time of his September 2001 deposition, Gomez was still taking orders from Aronoff and Veitia regarding when to engage in transactions and when to sign things. (Doc. 199 Ex. 50, at 139). There was no correspondence from any of the securities issuers to Fondo or Oportunidad; Gomez opined that perhaps the correspondence went to Aronoff. (Doc. 199 Ex. 50, at 139). Gomez had never heard of New Concepts. (Doc. 199 Ex. 50, at 196).

Regarding the transactions with the securities issuers, Gomez did not participate in the sales decisions; Gomez would receive a set of documents from Aronoff or the attorneys for the issuers, and then Gomez would call Veitia and/or Aronoff to get approval. (Doc. 199, Ex. 50 at 218). If Veitia or Aronoff said it was okay to sign, then Gomez would sign. (Doc. 199 Ex. 50, at 219).

Gomez is now aware that Fondo and Oportunidad had accounts at Canadian and United States brokerages in which securities were bought and sold, but at no time did Gomez direct the purchase or sale of the securities. (Doc. 199 Ex. 50, at 224). Gomez did not have the brokerage records for Fondo or Oportunidad until 1996, and he did not receive statements as the stock sales and purchases were occurring in 1994-1996. (Doc. 199 Ex. 50, at 225-26).

The Defendants have not presented any contrary evidence regarding who controlled Fondo and Oportunidad. Defendants' assertions that "the evidence could support a finding that Veitia, Spratt, or CRG were simply helping a foreign entity and friend, Gomez, take advantage of Regulation S" are baseless. On the contrary, there simply are no genuine issues of material fact as to who controlled Fondo and Oportunidad, as the evidence plainly shows that Veitia, CRG, and Stratcomm, by controlling Gomez and the Costa Rican entities, used Regulation S to avoid the requirements of the securities laws.

The undisputed record evidence shows that Veitia paid for the incorporation of Fondo; that Veitia directed Gomez to appoint Leonard Aronoff attorney-in-fact for Fondo and Oportunidad; that Gomez did not possess the books and records of Fondo and Oportunidad until 1996; that CRG introduced Fondo and Oportunidad to CRG's issuer-clients and negotiated the deals; that CRG made all of the trading and investment decisions; that Gomez confirmed with Veitia all instructions as to performing tasks on behalf of Fondo and Oportunidad; that CRG and New Concepts made a profit-sharing agreement pursuant to which CRG used an account maintained at New Concepts to sell securities supposedly purchased by Fondo and Oportunidad pursuant to Regulation S; and that CRG paid for the Regulation S stock or directed the financing of the purchases through other United States investors. Thus, the record plainly shows control of Fondo and Oportunidad by Veitia, CRG, and Stratcomm and that sales to these foreign entities were merely a ruse to attempt to avoid the registration requirements.

Although the Defendants contend that Regulation S was not understood during the years at issue and that they should not be held responsible for not complying with it, this argument is without merit. Cf. Parnes, 2001 WL 1658275, at *7 ("But Regulation S did in fact provide notice that exemption would not be available 'with respect to any transactions that, although in technical compliance with these rules, was part of a plan or scheme to evade the registration provisions of the Act.'") (quoting 17 C.F.R. § 230.901-905, prelim. note 2). The evidence shows no confusion or misapprehension on the part of the Defendants, but rather a calculated albeit failed attempt to evade a regulation that they well understood.

In sum, the SEC has established all of the elements of a Section 5 violation against Defendants Veitia, CRG, and Stratcomm. The record shows that these Defendants offered and sold unregistered securities through interstate commerce and the mails, and the Defendants have not established the applicability of Regulation S or any other exemption from registration.

Count V – Section 15(a) of the Exchange Act

In Count V of the Complaint, the SEC alleges sale of securities by unregistered persons in violation of Section 15(a)(1) of the Securities Exchange Act of 1933 (15 U.S.C. § 78*o*(a)(1)).[18] The SEC alleges that CRG acted as a broker without registering as a broker

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[18]Section 15(a)(1) provides:

> It shall be unlawful for any broker or dealer which is either a person other than a natural person or a natural person not associated with a broker or dealer which is a person other than

as required by Section 15(a)(1) of the Exchange Act and that CRG and Stratcomm acted as dealers without being registered as a dealer as required by the same section. As correctly noted by the SEC, scienter is not required for Section 15(a) violations. See, e.g., SEC v. Randy, 38 F. Supp. 2d 657, 667 (N.D. Ill. 1999); SEC v. Nat'l Executive Planners, Ltd., 503 F. Supp. 1066, 1073 (M.D.N.C. 1980).

i. Broker

Section 15(a)(1) requires that persons acting as a broker be registered as such with the SEC. For the purposes of the section, "broker" is defined as "any person engaging in the business of effecting transactions in securities for the account of others, but does not include a bank." 15 U.S.C. § 78c(a)(4). In the Complaint, the SEC alleges that CRG acted as a broker "by engaging in the business of touting its clients' securities to registered representatives through" CRG's broker relations executives ("BREs"). (Doc. 1 at 69). The BREs allegedly "encouraged registered representatives to sell such securities to their clients," and "[u]pon such sales, CRG paid commissions to the BREs." (Doc. 1 at 69).

In determining whether a person has acted as a "broker," several factors are considered. These factors include "whether the person: 1) actively solicited investors; 2)

> a natural person (other than such a broker or dealer whose business is exclusively intrastate and who does not make use of any facility of a national securities exchange) to make use of the mails or any means or instrumentality of interstate commerce to effect any transactions in, or to induce or attempt to induce the purchase or sale of, any security (other than an exempted security or commercial paper, bankers' acceptances, or commercial bills) unless such broker or dealer is registered in accordance with subsection (b) of this section.

advised investors as to the merits of an investment; 3) acted with a 'certain regularity of participation in securities transactions'; and 4) received commissions or transaction-based re[m]u[n]eration." *In re* Kemprowski & the Cambridge Consulting Co., Exchange Act Release No. 34-35058, 1994 WL 684628, at *2 (Dec. 8, 1994). Additional factors include whether the person "is an employee of the issuer; . . . is selling, or previously sold, the securities of other issuers; . . . [and] is involved in negotiations between the issuer and the investor." SEC v. Hansen, No. 83 Civ. 3692, 1984 U.S. Dist. LEXIS 17835, at *26 (S.D.N.Y. Apr. 6, 1984).

In support of its assertion that the undisputed record evidence establishes that CRG actively solicited sales of securities and thus acted as a broker despite not being registered with the SEC to do so, the SEC cites to paragraphs 116 and 117 of its Stipulated Facts (Doc. 193). These paragraphs describe testimony given by former CRG BREs John Schmalowski (Doc. 199 Ex. 70) and Peter Richard Scott (Doc. 199 Ex. 71) in an SEC investigation. In their testimony, Schmalowski and Scott state that at CRG's direction, the "BREs encouraged registered representatives to pitch the securities of CRG's clients to their customers and also counseled investors directly to purchase promoted stock if they called CRG in response to CRG publications." (Doc. 193 ¶ 116). Then, once the customers of the registered representatives bought the securities, the BREs would submit proof of the purchase to CRG, which would then compensate the BREs based on the sale. (Doc. 193 ¶ 116).

Based on this evidence and the pertinent factors set forth in SEC rulings, and especially considering the transaction-based compensation that the BREs were paid upon presentment of proof of securities transactions, the Court finds that CRG acted as a broker without registration. CRG actively sought investors, CRG recommended securities to investors through registered representatives, and CRG's BREs received transaction-based compensation for stock sales. See Kemprowski, 1994 WL 684628, at *3 (finding that individual defendant and the consulting company he founded acted as brokers where they "[1)] repeatedly contacted potential investors, directly and through registered representatives, to make sales pitches; 2) facilitated stock sales; and 3) received compensation based in part on sales of [issuer's] stock"); Hansen, 1984 U.S. Dist. LEXIS 17835, at *26-27 (finding that Hansen acted as a broker where he "received commissions on his sales" and "[b]y his advertisements, correspondence, and . . . seminars, . . . was an active and aggressive finder of investors and . . . frequently gave those investors extensive advice"); see also SEC v. Deyon, 977 F. Supp. 510, 518 (D. Me. 1997) (finding that defendants acted as brokers where they solicited investors in person and by phone, distributed documents, "prepared and distributed sales circulars in the hope that potential investors would deposit their money in the account," and "actively sought to effect securities transactions"), aff'd, 201 F.3d 428 (1st Cir. 1998). Thus, the SEC has established that CRG violated Section 15(a)(1) by acting as a broker without registering as such.

ii. Dealer

Section 15(a)(1) also requires that persons register as a dealer before acting as a dealer. "Dealer" is defined for the purposes of section 15(a)(1) as "any person engaged in the business of buying and selling securities for his own account, through a broker or otherwise, but does not include a bank, or any person insofar as he buys and sells securities for his own account, either individually or in some fiduciary capacity, but not as a part of a regular business." 15 U.S.C. § 78c(a)(5). The SEC contends that both CRG and Stratcomm meet this definition because they dealt in the securities of their clients and of Stratcomm, which they sold to the public directly despite not being registered as a dealer. In the Complaint, the SEC alleges that CRG acted as a dealer "by engaging in the business of buying and selling securities for its own account, through its nominees, Fondo and Oportunidad." (Doc. 1 at 70). As to Stratcomm, the Complaint alleges that Stratcomm acted as a dealer "when it sold for a profit approximately one million shares of common stock and bought stock from other investors in order to make delivery to new investors." (Doc. 1 at 70).

In support of its unauthorized dealer allegations, the SEC cites to paragraphs 119 and 120 of its Stipulated Facts (Doc. 193 ¶¶ 119-120). In those Stipulated Facts, it is stated that "CRG bought and sold securities for its own account through its nominees, Fondo and Oportunidad" and that "[o]n more than one dozen occasions, predominantly through Regulations S and D transactions, CRG bought securities, in the names of its nominees . . . and sold those securities in hundreds of transactions through a variety of accounts it maintained or in which it had an interest." (Doc. 193 ¶ 119). Additionally, the Stipulated Facts provide that "Stratcomm sold approximately 1,000,000 shares of Stratcomm common stock directly to members of the general public, collecting proceeds of roughly $1,000,000." (Doc. 193 ¶ 120).

As noted by the SEC in its memorandum in opposition to the Defendants' motion, the Defendants do not respond to the unregistered dealer allegations. (Doc. 211 at 15 n.17).

Thus, summary judgment for the SEC is appropriate on this portion of Count V as well.

Controlling Person Allegations

In addition to the alleged direct securities violations in Counts I, III, IV, and V, the SEC also alleges that Veitia and Stratcomm are liable under Section 20 of the Exchange Act (15 U.S.C. § 78t)[19] as controlling persons of CRG for CRG's infractions. Although the evidence does establish control of CRG by Veitia, the record is not clear as to Stratcomm's control of CRG.

The record reflects that CRG violated the securities laws, that Veitia had the power to control the general affairs of CRG, and that Veitia had the power to directly or indirectly control the specific CRG corporate policy that resulted in primary liability of CRG for each

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[19]Section 20 of the Securities Exchange Act (15 U.S.C. § 78t) provides in part:

> Liability of controlling persons and persons who aid and abet violations
>
> (a) Joint and several liability; good faith defense
>
> Every person who, directly or indirectly, controls any person liable under any provision of this chapter or of any rule or regulation thereunder shall also be liable jointly and severally with and to the same extent as such controlled person to any person to whom such controlled person is liable, unless the controlling person acted in good faith and did not directly or indirectly induce the act or acts constituting the violation or cause of action.
>
> (b) Unlawful activity through or by means of any other person
>
> It shall be unlawful for any person, directly or indirectly, to do any act or thing which it would be unlawful for such person to do under the provisions of this chapter or any rule or regulation thereunder through or by means of any other person.

of CRG's violations. See, e.g., Theoharous v. Fong, 256 F.3d 1219 (11th Cir. 2001); Brown v. Enstar Group, Inc., 84 F.3d 393 (11th Cir. 1996). Hence, the SEC has established that Veitia is liable for CRG's violations as a controlling person of CRG.

However, the evidence does not support the SEC's contention that Stratcomm possessed the requisite power and control over CRG on all counts. To be sure, the statement in the stipulated facts that CRG's publications "were operated by Stratcomm at Veitia's direction and control" (Doc. 193 at 2) is uncontested. Nevertheless, although the operation of the publications is sufficient to establish Stratcomm's liability on the publication-related counts, it does not establish that Stratcomm had the authority to control CRG to the extent necessary to support controlling-person liability of Stratcomm for CRG's infractions.

IV. Conclusion

The SEC has established its claims against the Veitia Defendants. The undisputed record shows that the Veitia Defendants committed securities fraud, violated the anti-touting provision, and did not comply with the registration requirements of the securities statutes. Accordingly, it is **ORDERED** as follows:

1. Defendants' Corporate Relations Group, Inc., Gulf Atlantic Publishing, Inc., Roberto Veitia, and Stratcomm Media, Ltd. Supplemental Motion for Summary Judgment (Doc. No. 216) is **DENIED**.

2. Defendants' Corporate Relations Group, Inc., Gulf Atlantic Publishing, Inc., Roberto Veitia, and Stratcomm Media, Ltd. Motion for Summary Judgment (Doc. 205) is **DENIED as moot.**

3. Plaintiff's Motion for Summary Judgment as to Defendants Veitia, Stratcomm, CRG and Gulf Atlantic (Doc. No. 191) is **GRANTED**. The Securities and Exchange Commission shall submit a proposed judgment consistent with this Order **on or before Friday, April 11, 2003**. Such proposed judgment shall contain up-to-date interest computations and proposed penalty and disgorgement totals.

DONE and **ORDERED** in Orlando, Florida this 28 day of March, 2003.

JOHN ANTOON II
United States District Judge

Copies furnished to:
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F I L E   C O P Y

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